91-558

No. -

In The

Supreme Court of the United States

October Term, 1991

THE COUNTY OF ALLEGANY, New York,

Petitioner,

vs.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and WILLIAM P. BARR, as Acting United States Attorney General,

Respondents,

STATE OF WASHINGTON, STATE OF NEVADA, and STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1511, 1512, 1513 — August Term, 1990
(Argued: May 21,1991 Decided: August 8,1991)
Docket Nos. 91-6031, 91-6033 & 91-6035

THE STATE OF NEW YORK, THE COUNTY OF ALLEGANY, NEW YORK and THE COUNTY OF CORTLAND, NEW YORK,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and RICHARD THORNBURGH, as United States Attorney General,

Defendants-Appellees,

STATE OF WASHINGTON; STATE OF NEVADA; and STATE OF SOUTH CAROLINA,

Intervenors-Appellees,

AMERICAN COLLEGE OF NUCLEAR PHYSICIANS; ARIZONA PUBLIC SERVICE COMPANY; BALTIMORE GAS & ELECTRIC COMPANY; CALIFORNIA RADIOACTIVE MATERIALS MANAGEMENT FORUM, INC.; COMMONWEALTH EDISON COMPANY; FLORIDA POWER & LIGHT COMPANY; GULF STATES UTILITIES COM-

PANY; MALLINKRODT MEDICAL, INC.; PACIFIC GAS & ELECTRIC CO.; PUBLIC SERVICE COMPANY OF COLORADO; SOCIETY OF NUCLEAR MEDICINE; SOUTHERN CALIFORNIA EDISON CO.,

Amici Curiae.

Before:

MESKILL, PIERCE and MCLAUGHLIN,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*), dismissing a civil complaint seeking declaratory judgment. 28 U.S.C. §§ 2201, 2202.

Held: Under *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, does not violate state sovereignty protected under the Tenth Amendment and related principles of federalism.

AFFIRMED.

PETER SCHIFF, Deputy Solicitor General, State of New York (Robert Abrams, Attorney General of the State of New York, O. Peter Sherwood, Solicitor General, John McConnell, Assistant Attorney General, of counsel) *for Plaintiff-Appellant State of New York.*

EDWARD F. PREMO, II, Harter, Secrest & Emery, Rochester, N.Y. (Paul D. Sylvestri, of counsel) *for Plaintiff-Appellant County of Allegany, New York.*

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JAMES PATRICK HUDSON, Deputy Attorney General, State of South Carolina, Columbia, S.C. (T. Travis Medlock, Attorney General of the State of South Carolina) *for Intervenor-Appellee State of South Carolina.*

DONALD J. SILVERMAN, Newman & Holtzinger, P.C., Washington, D.C. (Patricia A.E. Comella and Steve A. Linick, of counsel) *brief submitted for Amici Curiae in support of Appellees.*

MCLAUGHLIN, *Circuit Judge*:

Plaintiffs-appellants appeal from a judgment entered in the United States District Court for the Northern District of New York (Con. G. Cholakis, *Judge*), dismissing a civil complaint seeking declaratory relief. 28 U.S.C. §§ 2201, 2202. The district court found that the Low-Level Radioactive Waste Policy

Amendments Act of 1985, 42 U.S.C. § 2021b-2021j, was not an impermissible affront to state sovereign immunity protected under the Tenth Amendment, and that, absent unequal treatment accorded to the State of New York or a defect in the federal political process, Supreme Court precedent precludes further judicial review of the federal statute. The district court also found no Eleventh Amendment violation and dismissed plaintiffs' remaining challenges as meritless.

For the reasons set forth, we affirm.

BACKGROUND

More than thirty years ago, Congress sought to engage the states in a partnership venture that would recognize the interests of the several states in the peaceful uses of nuclear energy. Pub. L. No. 86-373, § 1, 73 Stat. 688, codified as amended 42 U.S.C. § 2021. *See English v. General Elec. Co.*, 110 S. Ct. 2270, 2276 (1990) ("In 1959, Congress amended the Atomic Energy Act in order to 'clarify the respective responsibilities ... of the States and the [Federal Government]' ... and generally to increase the States' role."). Under the Atomic Energy Act, the Atomic Energy Commission, predecessor to the Nuclear Regulatory Commission ("NRC" or "Commission"), was authorized to make agreements with the Governor of any state "providing for discontinuance of the regulatory authority of the Commission" with respect to enumerated nuclear materials and byproducts. 42 U.S.C. § 2021(b).

In 1959, an advisory committee formed at the behest of Governor Nelson A. Rockefeller recommended that New York execute an agreement with the Commission to have the State assume all regulatory control possible under federal law. It should be noted, too, that the advisory committee also recommended at that early date that the State establish a site to store radioactive waste, in part, "to encourage the growth of the atomic industry within the

state." Even before the advisory committee's report was issued, the New York State Legislature passed the 1959 Atomic Energy Act, *see* 1959 N.Y. Laws Ch. 41, declaring it to be the State's policy to encourage "development and use of atomic energy for peaceful purposes." New York became a so-called "agreement state" under the federal scheme by 1962. 27 Fed. Reg. 10,419 (1962).

A concern, universally acknowledged, that has accompanied the expansion of the nuclear industry is the storage and disposal of low-level radioactive waste ("LLRW") such as contaminated waste from nuclear reactors, hospitals, research laboratories and pharmaceutical companies. During the 1970's, disturbing problems surrounding safe LLRW disposal reached mammoth proportions and commanded immediate congressional attention. As late as 1978 only three states — Washington, Nevada, and South Carolina — had established sites for LLRW operations; the rest of the country transported radioactive waste to these locations — with obvious risks.

The problem worsened dramatically when Washington and Nevada temporarily closed their sites because of improper handling, transportation and packaging of LLRW, shifting an already herculean task onto the lonely shoulders of South Carolina's Barnwell site. H.R. Rep. No. 314, 99th Cong., 1st Sess., pt. 2 at 17, *reprinted in* 1985 U.S. Code Cong. & Admin. News 2974, 3006. Understandably vexed that sister states were not bearing a fair share of the disposal burden, Washington voters approved a 1980 initiative to ban in-state disposal of LLRW generated outside Washington State. While that initiative was struck as unconstitutional, *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir. 1982) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978)), *cert. denied*, 461 U.S. 913 (1983), it demonstrated that the LLRW problem was fast becoming acute.

Congress turned its attention to these problems but, at the states' request, and in the interest of federalism, deferred action to allow the formulation of state-based and state-created proposals. 1985 U.S. Code Cong. & Admin. News at 3007. The National Governors' Association (NGA) spearheaded the effort with a Task Force to review and formulate a coordinated policy on the LLRW issue. Other state-based associations, including The National Conference of State Legislatures and the President's State Planning Council on Radioactive Waste Management, joined the effort. *Id.* Because, in the eyes of the NGA, disposition of low-level waste was largely a state responsibility, the Task Force's first recommendation to Congress was that "each state should accept primary responsibility for the safe disposal of low-level radioactive waste generated within its borders, except for waste generated at federal government facilities." Accordingly, the NGA invited Congress to enact legislation that would (1) authorize states to form interstate regional compacts; (2) eventually allow compact regions to exclude LLRW generated outside the region; and (3) provide for the safe interim storage of LLRW.

Congress complied by enacting the Low-Level Radioactive Waste Policy Act of 1980. 42 U.S.C. §§ 2021b-2021d (the "1980 Act"). Subject to congressional consent, states were authorized to form regional compacts and, after January 1, 1986, to refuse waste generated outside these established regions. Many states apparently progressed toward the establishment of regional compacts (or individual "go it alone" in-state disposal sites), but the original target date of January 1986 proved unrealistic. The three states that were accepting LLRW, disquieted with frustration, again looked to Congress. The NGA again stepped in to forge a state-based consensus and negotiated a seven-year extension, or "transition package" with the three sited states, buying more time for the regional solutions to become operable. 1985 U.S. Code Cong. & Admin. News at 3008.

Acting on this consensus, Congress adopted elaborate amendments to the 1980 Act, enacting the Low-Level Radioactive Waste Policy Amendments Act of 1985. 42 U.S.C. § 2021b-2021j ("1985 Amendments"). The 1985 Amendments set out a detailed schedule of deadlines ending on January 1, 1996, set forth periodic milestones for site development, and impose various penalties and surcharges for noncompliance. The penalty that has raised the most shackles is the "take title" provision: states that do not comply "shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred ... as a consequence." 42 U.S.C. § 2021e(d)(2)(C)

New York has not joined a regional compact. Choosing instead to "go it alone," New York enacted legislation effective July 26, 1986: (1) promulgating standards for site selection; (2) creating a commission to select a site; and (3) authorizing the construction of a LLRW disposal site. *See* 1986 N.Y. Laws Ch. 673. As of 1989, New York, in full compliance with the 1985 federal amendments, has certified that it will be able to store, manage, or dispose of its LLRW after January 1, 1993. *See* N.Y. Pub. Auth. Law § 1854-c (McKinney Supp. 1991). To date, New York's commission has designated five potential storage sites in New York, three in Allegany County, two in Cortland County.

In February 1990, the State of New York, joined by the Counties of Allegany and Cortland, brought an action in the United States District Court for the Northern District of New York seeking to declare the 1985 Amendments unconstitutional. They

claim that the 1985 Amendments violate the Tenth[1] and Eleventh[2] Amendments, as well as the due process clause of the Fifth Amendment[3] and the guaranty clause of article IV of the United States Constitution.[4] The States of Washington, Nevada and South Carolina, intervening by right, Fed. R. Civ. P. 24(a), joined the federal defendants to uphold the 1985 Amendments. A legion of utility companies, medical groups, and the like also sought to intervene. Their motions were denied, although they were permitted to file a brief as *amici curiae* in support of the intervenors and the federal defendants.

All parties moved or cross-moved for summary judgment. Fed. R. Civ. P. 56(c). In addition, the intervenors joined in defendants' motion to dismiss the complaint. Fed. R. Civ. P. 12(b)(6). After oral argument, the district court read into the record a decision dismissing the complaint. *New York v. United*

[1] The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

[2] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI.

[3] The due process clause of the Fifth Amendment provides that no person shall: be deprived of life, liberty, or property, without due process of law; U.S. Const. amend V.

[4] The guarantee clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4.

States, 757 F. Supp. 10 (N.D.N.Y. 1990).[5] The district court held that the 1985 Amendments did not violate the Tenth and Eleventh Amendments, and similarly dismissed plaintiffs' claims under the guaranty clause (and, implicitly, the due process clause), finding such claims "inextricably intertwined with the position just made in this decision, and those claims are accordingly dismissed." *Id.* at 13.

Plaintiffs appeal, reiterating the claim that the 1985 Amendments trench upon state sovereign immunity, but they do not press a due process claim on appeal. *See generally South Carolina v. Katzenbach*, 383 U.S. 301, 323- 24 (1966) (states are not "persons" within the meaning of the due process clause and, thus, are not protected by it); *Alabama v. EPA*, 871 F.2d 1548, 1554 (11th Cir.) (state which has toxic waste disposal site has no Fifth Amendment due process right and, therefore, cannot allege defective notice by the EPA), *cert. denied*, 110 S. Ct. 538 (1989).

[5] In its written opinion, the district court noted, "[a]t this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court." 757 F. Supp. at 11. The court, however, went on to grant the government's motion to dismiss the complaint. *Id.* at 13; *see* Fed. R. Civ. P. 12(b)(6). It is uncontested that the district court considered documentary evidence and affidavits. Accordingly, we treat the appeal as one from the grant of summary judgment. *Grand Union Co. v. Cord Meyer Dev. Corp.*, 735 F.2d 714, 717 (2d Cir. 1984). In reviewing *de novo* and considering the record in the light most favorable to appellants, we nonetheless fully agree with the court below that there exists no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Delaware & Hudson Ry. v. Consolidated Rail Corp.*, 902 F.2d 174, 177-78 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991). That said, we review whether the law was correctly applied. *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 203 (2d Cir. 1989); *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 45 (2d Cir. 1988) (citing 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2716, at 654 (2d ed. 1983)).

DISCUSSION

More than a decade ago, the Supreme Court declared that "[n]uclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). Thus, appellants undertake an unusually burdensome task to persuade us that federal disposal site control legislation impinges impermissibly upon state sovereignty. Indeed, one circuit court has already said, "that the [Atomic Energy] Act violates the Tenth Amendment has little basis for support. Congress, through its power to regulate interstate commerce and provide for the national defense and general welfare, clearly can enact legislation governing the use of nuclear energy." *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131, 135 (8th Cir. 1981). We are called upon to review the 1985 Amendments to that same Atomic Energy Act; the amendments are designed to ensure state compliance with a plan for safe LLRW disposal.

The 1985 Amendments declare that, in addition to certain classes of nuclear waste generated by the federal government,

> Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—
>
> (A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983.

42 U.S.C. § 2021c(a)(1). If a state fails to properly dispose of LLRW, certain penalties ensue:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

42 U.S.C. § 2021e(d)(2)(C).

It is this penalty provision that triggers the most vigorous constitutional challenges.

Appellants' first contention is that the 1985 Amendments violate the Tenth Amendment. Tenth Amendment analysis must now begin with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), where the Supreme Court instructed us that "[s]tate sovereign interests ... are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552 (overturning *National League of Cities v. Usery*, 426 U.S. 833 (1979)). In the intervening years, the Supreme Court has emphasized that the judicial role in evaluating Tenth Amendment challenges is narrowly cabined. *See South Carolina v. Baker*, 485 U.S. 505, 512 (1988) ("*Garcia* holds that the limits are structural, not substantive — *i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."); *see also* Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 72 (1989) ("In *Garcia*, five justices joined in a majority opinion that, in effect, concluded that if states desire to preserve any aspect of their sovereignty within the federal system they must look to Congress, and

not to the courts."); *The Supreme Court, 1987 Term — Leading Cases*, 102 Harv. L. Rev. 143, 228 (1988) (*Baker* "unequivocally repudiat[es] the suggestion that the tenth amendment requires any substantive or qualitative analysis of the national political process").

It is self-evident that virtually every congressional exercise of power under the commerce clause will limit state power over that commerce and, to that extent, will invite state objections under the Tenth Amendment. As the *Garcia* Court observed:

> The fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia, 469 U.S. at 554. (quoting *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983)). Other circuits, including ours, have employed the *Garcia* analysis. *See, e.g., Nevada v. Watkins*, 914 F.2d 1545, 1556 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991); *EEOC v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990) (noting that the "*Garcia-Baker* standard is a very high one"). Quite simply, "[w]ith rare exceptions, ... the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia*, 469 U.S. at 550.

Perusing the legislative history of the 1985 Amendments, the conclusion is inescapable that, rather than discovering defects in the political process, both the 1980 Act and its 1985 Amendments are paragons of legislative success, promoting state and federal comity in a fashion rarely seen in national politics. *See* Berkovitz, *Waste Wars: Did Congress "Nuke" State Sovereignty in the Low-Level Radioactive Waste Policy Amendments Act of 1985?*, 11 Harv. Envtl. L. Rev. 437, 474 (1987) [hereinafter *Waste Wars*] ("Th[e] extensive state involvement [in the 1980 federal act and 1985 federal amendments] produced substantial benefits for all the states, strongly suggesting that state sovereignty received adequate protection."). With both statutes, the Congress acted only after robust debate and a clearly articulated acceptance of NGA and other state-based recommendations. New York's senior Senator, urging adoption of the final version of the proposed amendments, proclaimed:

> New Yorkers will continue to light some of their lights with nuclear electricity — and their doctors will continue to use life-saving laboratory tests that depend on the use of radioactive materials. So will the citizens of South Carolina — and they will be able to watch New York, and the rest of the Nation, make their own arrangements to dispose of their own low-level radioactive wastes.

131 Cong. Rec. S38,423 (daily ed. Dec. 19, 1985) (statement of Senator Moynihan).

Turning specifically to the penalty provision that New York finds so offensive, we reject appellants' allegation that the "take title" provision, which they classify as a last-minute amendment to the House bill added to placate Senate demands, is the product of a grievous defect in the political process. They complain that this provision was not subject to timely scrutiny and committee debate. There is an irony in this grumbling when it is recalled that the Senate Environment and Public Works Committee was the author of the take title provision; it numbers among its members Senator Moynihan of New York. *See also Waste Wars*, 11 Harv. Envtl. L. Rev. at 458 ("The House nonetheless accepted the taking title provision by unanimous vote."). In any event, appellants misperceive the issue. "The political process ensures that laws that unduly burden the States will not be promulgated." *Garcia*, 469 U.S. at 556. *See Watkins*, 914 F.2d at 1556-57 ("[T]he tenth

amendment does not protect a State from being outvoted in Congress.... Nor can Nevada complain that its lack of representation on the Conference Committee created a defect in the political process."); *EEOC v. Vermont*, 904 F.2d at 802 ("In any event, the absence of a given legislator or legislators, so long as the legislative body's appropriate procedural rules have been followed, does not mean that the national process leading to the enactment of a given piece of legislation was flawed.").

Appellants raise an alternative objection to the take title provision. Noting that *Garcia* cited *Coyle v. Smith*, 221 U.S. 559 (1911), appellants argue that, even after *Garcia*, the Tenth Amendment imposes *some* substantive limitations upon federal power; and they conclude that the take title provision falls within that forbidden zone. We are not persuaded.

In *Coyle*, the Congress sought to condition Oklahoma's admission into the Union upon Oklahoma's agreement to locate, at least initially, its capital in Guthrie and accept certain limitations upon the State's power to change its seat of government. The Supreme Court found such conditions to be a palpable violation of the Tenth Amendment. *See Coyle*, 221 U.S. at 565 (that a state's power to locate its own seat of government "could now be shorn ... by an act of Congress would not be for a moment entertained").

In testing the waters surrounding *Garcia's* laconic reference to *Coyle*, the district court perceptively noted that the Supreme Court's central concern in *Coyle* was "equality in dignity and power" among the several states, 221 U.S. at 568, a concern clearly not at issue here where the motivating engine of both the 1980 Act and 1985 Amendments is identical treatment for all states.

It should also be noted that formal transfer of title to nuclear waste, although usually effected by contract, is not uncommon.

See General Elec. Uranium Management Corp. v. United States Dep't of Energy, 764 F.2d 896, 898 (D.C. Cir. 1985) (Secretary authorized to contract with persons who generate or hold title to nuclear waste, for the transfer of title to the Department of Energy); *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, 731 F. Supp. 850, 856 (N.D. Ill. 1990) (contingency clause in contract between private nuclear generator and private nuclear reprocessing plant requiring the latter, upon noncompliance, to accept title to nuclear waste).

In sum, we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia*; and "[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Baker*, 485 U.S. at 513 (emphasis in original); *see generally International Assoc. of Firefighters, Local 2203 v. West Adams County Fire Protection Dist.*, 877 F.2d 814, 821 (10th Cir. 1989) (absent agreement between state agency and employees, the Fair Labor Standards Act does not violate the Tenth Amendment by compelling state to compensate employees with overtime pay rather then compensatory time); *Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287, 298 (2d Cir.) (Rail Passenger Service Act, requiring the MTA to "permit the operation of Amtrack trains over its lines" does not violate the Tenth Amendment under *Garcia* or conscript the state to act in a way that unconstitutionally promotes a federal policy), *cert. denied*, 479 U.S. 1017 (1986).

Appellants, most notably Allegany County, strive to offer alternative grounds for declaring the 1985 Amendments unconstitutional. We are satisfied, however, that the 1985 Amendments do not violate the Eleventh Amendment. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989) (plurality opinion reasoning "that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit"); *see id.* at 57

(White, J., concurring) (agreeing "with the conclusion ... that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States"); *see also National Foods, Inc. v. Rubin*, No. 91-7084 slip op. 5039, 5043 (2d Cir. June 12, 1991) ("The Eleventh Amendment has been interpreted to render states absolutely immune from suit in federal court unless they have consented to be sued in that forum or unless Congress has overridden that immunity by statute."); *Russell v. Dunston*, 896 F.2d 664, 667 (2d Cir.) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)), *cert. denied*, 111 S. Ct. 50 (1990). Similarly, we agree with the district court that appellants' argument, anchored in the guarantee clause of article IV, that there is a deprivation of a republican form of government, is analytically indistinct from the arguments supporting sovereign immunity under the Tenth Amendment. *See Baker*, 485 U.S. at 511 n.5 ("We use 'the Tenth Amendment' to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.").

CONCLUSION

We have considered appellants' remaining arguments, but find them without merit. We conclude, therefore, that the 1985 Amendments pass constitutional muster. Accordingly, we affirm.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al,
Plaintiff,

-against- 90-CV-162

UNITED STATES OF AMERICA,
Defendant.

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December 7, 1990

CON. G. CHOLAKIS, D.J. *

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* The transcript of this opinion, delivered from the bench, has been edited for grammatical construction, organization of quotations, and augmentation of citations.

It is my intention at this time to read a decision into the record. I know that it may seem very unusual that a decision will be read into the record on a matter that is as complex and involved as this case obviously is. I do not want any of the participants to think that their positions have not been given due weight. We have spent an extraordinary amount of time on this one case in the past two weeks. As a matter of fact, I dare say we have spent as much time on this single case as we have spent on any other three or four cases combined during the last three or four years.

I do think, however, that in fairness to all the participants that a decision be made as quickly as possible so those parties involved can make a determination as to their future course of action. And I do not feel that just letting this matter sit for any length of time will do justice to the parties or to the Act itself. I have listened to all of the arguments presented by all of the attorneys, and I think I have given you relatively free reign because I was waiting to see if anyone could say anything that would change the feeling that the Court had about this subject after reading all of the papers, and as you know, the papers were voluminous. As a matter of fact, if I could sell them by the pound, I think I'd be in very good shape.

The plaintiffs State of New York and the Counties of Allegheny and Cortland challenge the constitutionality of the Low Level Radioactive Waste Policy Act Amendments of 1985, 42 U.S. Code Sections 2021 *et seq*, on the grounds that the Act violates the Tenth and Eleventh Amendments as well as the Guaranty Clause and Due Process Clause of the United States Constitution.

Before the Court are numerous motions and cross-motions. At this juncture all parties have moved for summary judgment, and there appear to be no issues of material fact, and the case therefore appears ready for summary treatment by the Court.

The United States in its motions to dismiss and for summary judgment relies principally on the Supreme Court case of *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). This case calls into question the judiciary's ability and authority to consider challenges to Congressional power over the States. *Garcia* overturned *National League of Cities v. Usury*, 426 U.S. 833 (1976), in which the Supreme Court proclaimed that the Tenth Amendment limited Congressional power to legislate under the Commerce Clause. The Court concluded in *National League* that the Tenth Amendment sheltered "the states' freedom to structure integral operations in areas of traditional governmental functions". Accordingly, Congress could not displace the states' freedom by regulating "the states as states" and limiting the attributes of State sovereignty. *Id.* at 552-554

In *Garcia*, a sharply divided Court rejected *National League,* concluding:

> In short, the framers chose to rely on a federal system in which special restraints on federal power over the states inhered principally in the workings of national government itself rather than in the discrete limitations on the objects of federal authority. State sovereign interests, then are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Garcia, 469 U.S. at 552.

The Court in *Garcia* ruled that judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to an inquiry of whether the political process has failed. The Court did, however, indicate that some additional limits might exist on Congressional action based on "the constitutional structure". The *Garcia* court, however, did not define or identify these limits apart from citing without discussion the 1911 Supreme Court case of *Coyle v. Oklahoma*, 211 U.S. 559.

The citing of the *Coyle* case is significant. The *Coyle* case struck down a Congressional enactment which conditioned the statehood of Oklahoma on the placement of the state capital at a certain location. The Court acknowledged at page 565 of that opinion that "the power to locate its own seat of government was essentially and peculiarly [a] state power". The holding in *Coyle*, however, is clearly based on the finding that Oklahoma was being forced to do something which no other state was being forced to do; that being to locate her capital according to the wishes of Congress.

The *Coyle* Court stated in the last paragraph of its opinion on page 58 the following:

> The constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears, we may remain a free people, but the Union will not be the Union of the Constitution.

Therefore, this Court reads *Garcia* as allowing judicial interdiction of federal powers over the states in the following areas: One, when that power is the result of a defect in the political process, and two, possibly when constitutional equality among the states has been jeopardized.

Garcia and the 1988 Supreme Court decision *South Carolina v. Baker,* 485 U.S. 505 (1988), foreclose, in this Court's view, judicial review of any Congressional action over the states which is validly enacted and equally applied to all states. Any review of the substantive merits of such an action apart from an inquiry into the "constitutional equality" of the action would require a judicially determined definition of the contours of state sovereignty. This Court is barred by *Garcia* from making such a definition.

The United States argues that there was no defect in the political proces in the passage of the Act and that no other judicial challenge may be made pursuant to *Garcia*. Plaintiff Cortland County argues that several political process defects exist which should invalidate the law.

First, Cortland County argues that a lack of political accountability of Congress as regards this Act is a signal that the political process has failed. Cortland's argument is that Congress has passed a law which puts burdens on the states to pass certain unpopular laws. The political "heat" as well as the fiscal burden are then absorbed by the states rather than by Congress, the truly responsible party. Cortland also presents a second political defect theory in which the Congress is portrayed as being controlled by political action committees who have neutralized states' interests and influence.

Taking Cortland's second argument first, it is clear that the pervasiveness of political action committees in Congress is not the type of systemic breakdown envisioned by the *Garcia* court. This argument is really nothing less than an indictment of how the political system works. According to *Garcia*, the proper remedy is not judicial intervention but the rejection by voters of those representatives who are beholden to the special interest groups. The "built-in restraints that our system provides" will presumably correct this perceived problem. Therefore, Cortland's position is, in this Court's view, without merit.

Cortland's argument concerning political accountability is similarly lacking in legal foundation. In the *South Carolina v. Baker* case, the Supreme Court declined to define what was meant by "political defects" but did characterize the terms as referred to "extraordinary defects in the national political process". *Baker* 485 U.S. at 515. The Court in its discussion cited to a

footnote contained in the 1938 Supreme Court case of *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4.

The Court interprets this authority as meaning that the "political process tests" referred to problems which may have had an untoward effect on a particular law's enactment or its subsequent political review. If the law is validly enacted, it may not thereafter be judicially challenged on political process grounds unless the effect of the law restricts a state from continuing meaningful political participation, where a state is foreclosed from challenging the law politically. In other words, the political process rationale for judicial intervention only arises when the legislative/political avenue has been functionally closed.

Such is not the case here. Nothing in the Act restricts New York's, or any other state's, ability to operate in the political arena and to challenge the law. This is not, in this Court's view, the type of political breakdown or type of extraordinary situation the Supreme Court envisioned as requiring judicial intervention. Therefore, this Court rejects any challenge to the Act based on the so-called "political process defect" test.

New York State argues that *Garcia* left open another path of attack other than the political process test. The State, joined by the other plaintiffs, argues that the Court still has the power to rule that particular laws destroy state sovereignty.

As just explained, this Court does not see how such an argument may be sustained and be consistent with *Garcia*. Plaintiffs do not allege that New York State is being treated inequitably with other States. The State's argument, reduced to its essence, would require this Court to dictate a sacred province of state autonomy, and this, in this Court's judgment, would violate the *Garcia* holding. In this Court's view, any claims under the Guaranty Clause are inextricably intertwined with the position just

made in this decision, and those claims are accordingly dismissed.

The claims under the Eleventh Amendment are likewise dismissed pursuant to the Supreme Court holding in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989).

This Court is aware that the *Garcia* case was decided by a divided court, that the make-up of the Court has since changed, and that the *Garcia* doctrines may not survive. In fact, it may well be this case which results in *Garcia* being overturned. While this Court has problems with the *Garcia* holding, it is nonetheless constrained by the precedents which it reads as residing therein.

The defendant United States' motion to dismiss the complaint is therefore granted in all respects. I believe I have an appropriate order which will be signed and in all probability will be filed today. Thank you ladies and gentlemen.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK, et al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

Civil Action No. 90-CV-162 (Judge Cholakis)

ORDER

This matter having come before the Court upon the Defendants' Motion to Dismiss; and the Court having reviewed and considered all items submitted by the parties on the aforesaid Motion; and good cause having been shown for the entry of this order;

It is, on this 7th day of Dec., 1990,

ORDERED:

Defendants' Motion to Dismiss is hereby Granted. Accordingly, all claims against Defendants are dismissed with prejudice.

s/ Con. G. Cholakis

Honorable Con. G. Cholakis
United States District Judge

United States District Court

Northern District of New York

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, NEW YORK; and THE COUNTY OF CORTLAND, NEW YORK

vs.

THE UNITED STATES OF AMERICA; WATKINS, JAMES D., as Secretary of Energy; CARR, KENNETH M., as Chairman of the U.S. Nuclear Regulatory Commission; THE U.S. NUCLEAR REGULATORY COMMISSION; SKINNER, SAMUEL K., as Secretary of Transportation; and THORNBURGH, RICHARD as U.S. Attorney General, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90-CV-162

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants' Motion to Dismiss is Granted and all claims against Defendants are dismissed with prejudice

December 26, 1990	GEORGE A. RAY
Date	*Clerk*
	s/ Mary Ann Francisco
	(By) Deputy Clerk

AFFIDAVIT [of Delores Cross] [Exhibits Excluded]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, New York; and THE COUNTY OF CORTLAND, New York;

Plaintiffs,

-against-

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and RICHARD THORNBURGH, as United States Attorney General,

Defendants.

90 CV 162
(Judge Con. C. Cholakis)

STATE OF NEW YORK)
COUNTY OF ALLEGANY) SS:

DELORES CROSS, being duly sworn deposes and says:

1. I am the Chairman of the Board of Legislators of the County of Allegany, New York ("the County"). I submit this Affidavit in opposition to the motion of the Defendants United States of America, *et al.*, to dismiss the Complaint in the above referenced matter. This affidavit is also submitted in support of the motion for summary judgment of Plaintiff the State of New York.

2. As shown below, the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §2021b *et seq.* ("the Act") mandates that the governments of the State of New York and its political subdivisions become unwilling agents of the national government. The Act forces the States to be "responsible" for low-level radioactive waste generated within the State by either (a) developing a disposal facility either alone or in a compact with other states , (b) assuming title and possession of the waste, or (c) by being subject to liability for any failure to take title and possession. Therefore, the Act requires the State of New York, and its political subdivision, Allegany County, to exercise its sovereign powers to carry out a federal policy. This requirement violates the Guaranty Clause, Article IV Section 4, and the 10th and the 11th Amendments to the United States Constitution.

A. *The Act Violates the Constitutional Guarantee of a Republican Form of Government.*

3. As alleged in the Complaint in this action, New York State has been forced to enact legislation (29 E.C.L. §0101 *et seq.*), regulations (6 N.Y.C.R.R. Part 382) and to proceed with the proposed siting of a low-level radioactive waste disposal facility because of the sanction provisions of the Act. The law and regulations enacted by the State of New York provide for a commission to select a preferred disposal method and site for a low-level radioactive disposal facility to be located in New York State. The various agencies of the State of New York and its political subdivisions are required to "cooperate" in this process.

4. In September, 1989, the New York State Low-Level Radioactive Waste Disposal Siting Commission ("the Commission") designated three potential sites of approximately one square mile in size for a low-level radioactive waste disposal facility in the Allegany County Towns of Caneadea, West Almond and Allen.

These three sites were selected from a candidate area previously identified by the Commission.

5. Immediately after a candidate area was identified in Allegany County, the Board of Legislators of Allegany County enacted on January 23, 1989, Resolution No. 45-89. This resolution protested the selection of the County and indicated the "irrevocable" opposition of Allegany County to the location of a disposal facility in the County. A copy of this resolution is annexed hereto as Exhibit A. On February 9, 1990, the Board of Legislators passed Resolution No. 63-90 authorizing the County to join as a plaintiff in this action to challenge the constitutionality of the Act. A copy of such resolution is annexed hereto as Exhibit B.

6. On various dates during late 1989 and the early part of 1990, the Commission attempted to gain access to the three sites in Allegany County to initiate so-called "pre-characterization" studies. The Commission was prevented from entering such sites by citizens of Allegany County. Unfortunately, these confrontations have resulted in numerous court proceedings and the arrests of citizens of Allegany County. The last incident in April, 1990, lead to an episode between Troopers of the State of New York Police and citizens of the County who were on horseback. A newspaper article describing this confrontation is annexed hereto as Exhibit C.

7. The citizens of Allegany County by public comment to the Board of Legislators, town boards and by the actions of various citizens' groups have made clear that they oppose the possible location of a low-level radioactive waste disposal site in Allegany County. Various businesses and educational institutions have also expressed their opposition to such a facility in the County. The Board of Legislators and County officials have all agreed that such a disposal site would be deleterious to the County.

8. Nevertheless, the County has been forced by the terms of the Act and resulting actions by the State of New York to act as "agents" to carry out the policy of the Act.

9. For example, the Sheriff of Allegany County has been forced to serve civil process and to accompany members of the Commission Staff on various attempted visits to the potential sites. Allegany County facilities such as the County jail, County Courthouse and other buildings have been used for the purpose of holding citizens who have been charged with impeding the actions of the Commission. The Allegany County District Attorney and his staff have been forced to become involved in criminal prosecutions of citizens who allegedly illegally impeded the siting process. At various times the State of New York has indicated that the County may have to invoke the "mutual aid" system for additional police protection. Once such "mutual aid" is requested, the County becomes financially liable for the service provided. Innumerable hours have been spent by officials of Allegany County in setting up procedures to attempt to avoid violence during the siting process.

10. All of these actions and expenditures of funds are the direct result of the Act, and the resulting State government reaction, and are against the wishes of the citizens of Allegany County. The various officials of Allegany County, against their will and the will of their constituents, have become agents of the federal government and forced to carry out the Congressional mandate with respect to low-level radioactive waste.

11. The Act has caused damage to the vital relationship between the people of Allegany County and their elected representatives. The compact between them has been broken. The United States Constitution, Article IV Section 4, guarantees to the State a Republican Form of Government — one in which the people control the government. However, the government of the State of

New York and the government of Allegany County, with respect to the issue of low-level radioactive wastes, are no longer controlled by their citizens but by the federal government. The State and County governments have been forced and will be forced to exercise their sovereign powers, including police powers, eminent domain and taxing powers to execute a policy that our citizens vehemently oppose. Certainly, nothing could be more destructive of the "Republican Form of Government" than this.

B. *The Act has Jeopardized the Future of the County.*

12. The mere designation of the County as potential sites for low-level radioactive waste disposal facility have harmed the County financially. In order to respond to the work of the Commission and to insure the health and welfare of its citizens, the County has been forced to expend considerable funds for special legal and technical consultants. If the siting process continues, the County will be forced to expend funds for consultants to be involved in studies concerning disposal methods, the Commission's environmental impact statement, preparation for adjudicatory hearing on method selection, review of the siting process and resulting adjudicatory hearing and the provision of public information for the Allegany County community. As the process continues, the financial impact on the County will only increase. The County has approximately 50,000 residents and the financial impact on each of them for such activities is severe.

13. Moreover, individual County landowners have been harmed by the County being named as a potential site. Land values in the affected areas have dropped. Loans for further development of these properties and neighboring properties will be difficult, if not impossible, to obtain.

14. The citizens of the entire County, and, in particular, the citizens of the affected areas, have been subject to emotional stress and duress. Given the history of the nuclear industry in this

country, this concern is understandable. The combination of operational practices, water infiltration and seepage through trench caps led to the closure of the West Valley, New York facility only 12 years after opening. The West Valley facility is located only fifteen miles away from the border of Allegany County. The Maxey Flats, Kentucky site also experienced an ingress of water which led to the migration of harmful radionuclides from the burial sites. Cleanup costs at various radioactive waste disposal sites across the country have ranged from $7 million to billions of dollars.

15. Our citizens are not only concerned for their own welfare and the natural resources around them, but for their children's and grandchildren's future. The very real potential of debilitating cancerous diseases and genetic damage has frightened our citizens. This has led many people to pledge that they will do whatever is necessary to prevent the siting of a facility in Allegany County. Many County officials have grave concern for the potential of violence in our County.

16. The potential impact of the siting of a disposal facility on the County's industries would be severe. Agriculture is Allegany County's leading industry at this time. The three potential sites in the County include many acres of land which contain valuable soil groups and which have potential for active agricultural development. The County also relies heavily upon groundwater in the area for drinking water. All of the three sites in Allegany County are located within close proximity of potentially very productive aquifers of the Genesee River Valley. The Genesee River Valley could be a supply of potable water for the future growth of Allegany County if it is properly protected.

17. There are also untapped reserves of oil and gas that are located in the County. With the quickly rising price of petroleum products and the crisis in the Persian Gulf, these resources are becoming more competitive for development. Yet, the potential

of a siting of a low-level radioactive waste disposal facility endangers such vital development. Oil and gas wells have been drilled throughout the County since the 1860s. Any leakage of radionuclides could quickly migrate and might contaminate oil and gas reserves rendering them useless. Certainly, no development of oil and gas reserves could take place at the site of a disposal facility.

18. The quality of life in Allegany County would be dramatically affected by the location of a low-level radioactive waste disposal site in the County. The stigma associated with such a site would certainly have severe consequences for area business, tourism and the day to day lifestyle. Already, the leaders of the Amish community located in Allegany County, which constitutes an important part of the agricultural community, have indicated that their community will move from the County if such a disposal facility is located here. Many other citizens have made the same statement to me. One can only imagine that with people unwilling to live in the County, businesses would soon leave because of the lack of employable workers and customers.

19. Even if the State were to decide not to build such a facility, Allegany County and its citizens would be affected by the Act. A decision by the State of New York not to build a disposal facility would result in the State of New York being liable for the low-level radioactive waste generated in the State. The resulting drain on the State treasury is incalculable and would certainly result in increased taxes for the citizens of Allegany County and a lack of funds from the State to Allegany County for needed programs.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this Court deny the Defendants' motion to dismiss the Complaint in the above referenced matter and grant the motion of the State of New York for summary judgment declaring the Act to be unconstitutional.

s/ Delores Cross

DELORES CROSS

Sworn to before me this 5th
day of September, 1990.

s/ Felicia F. Biancuzzo

Notary Public
FELICIA F. BIANCUZZO
NOTARY PUBLIC, State of New York
Residing in Allegany County, Reg. #0285225
Commission Expires April 30, 1991

AFFIDAVIT [of Clarence D. Rappleyea, Jr.]
[Exhibits Excluded]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY, New York; and THE COUNTY OF CORTLAND, New York;

Plaintiffs,

-against-

90 CV 162

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; KENNETH M. CARR, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; SAMUEL K. SKINNER, as Secretary of Transportation; and RICHARD THORNBURGH, as United States Attorney General,

Defendants.

CLARENCE D. RAPPLEYEA, JR., being duly sworn, deposes and says:

1. That I am the Assemblyman representing the 122nd Assembly District in the New York State Assembly, which district encompasses the County of Cortland, State of New York. My Assembly office is located in Room 933, Legislative Office Building, Empire State Plaza, Albany, New York 12248 and I also maintain a District Office at 17 Main Street, Cortland, New York 13045.

2. Additionally, I have been duly elected by the Republican Conference in the New York State Assembly to serve as the Minority Leader of the New York State Assembly and I have served in this position since 1983.

3. That I also am an Attorney, duly admitted to practice law in the State of New York and I conduct a law practice at Hinman, Howard and Katell, Esqs., 2 Hayes Street, Norwich, New York 13815, which office is located in the County of Chenango, State of New York.

4. That I make this affidavit in support of the instant action brought by the Plaintiffs seeking a declaratory judgment finding that the Low-Level Radioactive Waste Policy Amendments Act of 1985 is unconstitutional and, therefore, null and void.

5. As the Assemblyman representing Cortland County, one of the Plaintiffs herein, and as Minority Leader in the New York State Assembly, I submit this affidavit to offer affirmations and documents relevant to the enactment of Chapter 673 of the Laws of 1986 of the State of New York (Assembly Bill 11729/Senate Bill 9616) and, upon information and belief, to set forth my understanding of the legislative intent related to the adoption of such statute.

6. On July 3rd, 1986 the New York State Assembly and Senate during the final hours of the 1986 Legislative Session passed legislation referred to as Senate Bill 9616 (Assembly Bill 11729) regarding management of low-level radioactive waste generated in New York State. As evidenced by the Assembly roll call, a copy of which is attached hereto as Exhibit A and made a part hereof, the New York State Assembly voted 144-0 in favor of the adoption of this legislation at 1:22 p.m. on said date. Similarly, the New York State Senate also voted unanimously on July 3rd to

adopt Senate Bill 9616 as indicated in the Senate roll call, a copy of which is annexed hereto as Exhibit B and made a part hereof.

7. Annexed hereto as Exhibit C is the two page transcript of the Assembly proceedings on July 3rd, 1986 for Senate Bill 9616. The transcript reflects the proceedings of the New York State Assembly wherein this legislation was called for an immediate vote without any debate.

8. Upon information and belief, subsequent to passage by both Houses of the New York State Legislature, said bill was signed into law by Governor Cuomo and became Chapter 673 of the Laws of 1986 for the State of New York, a copy of which is annexed hereto as Exhibit D and made a part hereof. Your deponent respectfully refers to Section 2 of said Chapter 673 which clearly references the federal Low-Level Radioactive Waste Policy Act and the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 as the impetus for New York State to take immediate steps in connection with the selection of disposal methods for the siting, construction and operation of management facilities in New York State. Said legislative findings identify the January 1st, 1993 milestone, as established by federal statute, as the principal foundation for the passage of this legislation.

9. Your deponent respectfully asserts that in the absence of such federal mandates, the New York State Assembly would not have acted during the 1986 Legislative Session to consider and pass New York's Low-Level Radioactive Waste Management Act (Chapter 673 of the Laws of 1986 for the State of New York).

10. In furtherance of my assertion that the New York State Legislature acted in response to federal dictates, annexed hereto as Exhibit E is a copy of the bill jacket for Chapter 673 of the Laws of 1986 for the State of New York. To the best of my knowledge as a Member of the Assembly, subsequent to the passage of

legislation, the Governor's Office circulates such legislation for comment by appropriate state agencies and other interested third parties to solicit and compile opinions regarding the adoption or veto of bills that have passed the Legislature. An extensive bill jacket was accumulated on Senate bill 9616 and each submission in said bill jacket emphasizes the federal requirements and milestones of the Low-Level Radioactive Waste Policy ACt of 1980 and the Low-Level Radioactive Waste Policy Amendments Act of 1985.

11. In support of Plaintiffs' Complaint, I further allege, upon information and belief, that the federal compulsion which led to the adoption of Chapter 673 of the Laws of 1986 in New York State has further imposed a disruptive impact on governmental processes at local and state levels. The siting process required by federal statute to be undertaken in New York State has had severe ramifications for the County of Cortland and the State of New York, in terms of both social and economic cost. Extensive public outcry, including public rallies and demonstrations, the formation of constituent groups opposing the siting process, instances of public reaction which could be deemed civil disobedience, and all the attendant law enforcement problems and expenses related to maintaining public safety have been thrust upon the County of Cortland as it attempts to respond to its selection as a potential disposal site. Such public reaction is more fully described in the affidavit submitted on behalf of the County of Cortland but as its Assemblyman, I can attest to the prominence of this issue both for local and county officials, as well as state representatives.

12. Upon information and belief, the siting process has detrimentally affected the economic development of Cortland County in that land values have depreciated and the number of land transactions has declined. Potential businesses have questioned the feasibility of locating in the County, and the public has

demanded further information regarding public health and safety in the event of the establishment of a low-level radioactive waste disposal facility within their locale. Although these concerns are more particularly addressed in the submissions from Cortland County, as a Member of the Assembly I have received approximately 3500 letters or mailings from my constituents voicing their opposition to the siting process and questioning the need for New York State to establish a disposal facility in light of the decreasing volume of low-level radioactive waste produced not only in New York State but nationwide.

13. Unquestionably, the federal compulsion which caused New York to enact Chapter 673 of the Laws of 1986 has propelled Cortland County into a period of turbulent public reaction occasioning additional governmental costs, not only for law enforcement expenditures but to properly respond to the scientific and technical issues involved in the siting process. These political, social and economic burdens would not have been experienced in Cortland County but for the federal actions at issue in this proceeding.

WHEREFORE, your deponent respectfully requests that this Court deny the Defendants' motion to dismiss.

Date: September 5, 1990

s/ Clarence D. Rappleyea, Jr.

Clarence D. Rappleyea, Jr.

Sworn to before me this
5th day of September, 1990.

s/ Helen R. Taranto

Notary Public
HELEN R. TARANTO
Notary Public in the State of New York
Residing in Chenango County
Reg. No. 3932435
My Commission Expires July 31, 1991